91-906

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES SAFFLE, WARDEN, and
GARY MAYNARD, DIRECTOR, OKLAHOMA
DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

MARK ROY LILES,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1991 *Counsel of Record

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARK ROY LILES, Petitioner-Appellee, v. JAMES L. SAFFLE, Warden, State Penitentiary at Mclester, Respondent-Appellant, and GARY MAYNARD, Director, Oklahoma Department of Corrections; ROBERT H. HENRY, Attorney General of Oklahoma, Respondents.	)	No. 90-6380

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. CIV-89-2271-W)

Submitted on the briefs:

William J. Mertens of Swindler & Berlin, Chartered, Washington, D.C., and Patti Palmer, Oklahoma Appellate Public Defender System, Norman, Oklahoma, for Petitioner-Appellee.

Robert H. Henry, Attorney General of the State of Oklahoma and A. Diane Hammons, Assistant Attorney General, Oklahoma City, Oklahoma, for Respondent-Appellant.

Before SEYMOUR, EBEL, Circuit Judges, and BABCOCK, ** District Judge.

**Honorable Lewis T. Babcock, District Judge, United States District Court for the District of Colorado, sitting by designation.

SEYMOUR, Circuit Judge.

Respondent James L. Saffle appeals from the district court's order granting habeas relief to petitioner Mark Roy Liles, under 28 U.S.C. § 2254, from his

conviction for first degree murder and sentence of death.[1] In vacating the conviction, the district court determined that, under Ake v. Oklahoma, 470 U.S. 68 (1985), the state trial court had deprived petitioner of due process by denying his pretrial motion for state funds to employ a psychiatrist in aid of his defense. We affirm.

On August 31, 1982, the State of Oklahoma charged petitioner with murder occurring during the commission of an armed robbery. See Okla. Stat. Ann. tit. 21, § 701.7B. A jury convicted petitioner of first degree murder and

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

sentenced him to death, finding the existence of two aggravating factors: the killing was especially heinous, atrocious, or cruel, and petitioner posed a continuing threat to society. See Okla. Stat. Ann. tit. 21, § 701.12.

The Oklahoma Court of Criminal Appeals upheld petitioner's conviction. Liles v. State, 702 P.2d 1025 (Okla. Crim. App. 1985), cert. denied, 476 U.S. 1164 (1986). He subsequently challenged his conviction and sentence through two state post-conviction proceedings, again without avail. Liles v. State, No. PC-87-391 (Okla. Crim. App. July 9, 1987), cert. denied, 484 U.S. 933 (1987); Liles v. State, No. PC-88-589 (Okla. Crim. App. Apr. 25, 1989), cert. denied, 110 S. Ct. 353 (1989).

Petitioner then filed this petition for habeas relief in the United States District Court for the Western District of Oklahoma, asserting thirteen grounds for relief. He moved for summary judgment on the ground that the trial court had deprived him of due process by denying his motion for funds to employ a psychiatric expert. The district court granted petitioner's motion for summary judgment, relying upon Ake, 470 U.S. 68.[2]

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[2] Because the United States Supreme Court decided Ake while petitioner's direct appeal was pending, this case does not present a retroactivity issue. See Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987). Further, the parties do not dispute that petitioner has exhausted his state court remedies concerning the issue presented by this appeal. See generally White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

On appeal, respondent challenges the district court's determination that the trial court deprived petitioner of due process by denying him psychiatric assistance at both the guilt and the sentencing phases of his trial. This court will review an order granting summary judgment de novo. Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.; Fed. R. Civ. P. 56(c) (1991).

The Supreme Court premised its decision in Ake on the principle that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making

certain that he has access to the raw materials integral to the building of an effective defense." 470 U.S. at 77. Applying that principle to the issue of "whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense," id., the Court determined that, although

> [a] defendant's mental condition is not necessarily at issue in every criminal proceeding, . . . when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in

> evaluation, preparation, and presentation of the defense.

Id. at 82-83. Similarly, under certain circumstances, due process also entitles a criminal defendant to court-appointed psychiatric assistance during the sentencing phase of a capital proceeding. Id. at 83-84.

A criminal defendant is entitled to psychiatric assistance at trial when he is able to make "an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." Id. at 82-83. See United States v. Austin, 933 F.2d 833, 841 (10th Cir. 1991).

> [I]f "sanity" or "mental capacity" defenses [are] to be defense issues, they must be established by a "clear showing" by the indigent defendant as "genuine," "real" issues in the case. In order for a defendant's mental state to become a

> substantial threshold issue, the showing must be clear and genuine, one that constitutes a "close" question which may well be decided one way or the other. It must be one that is fairly debatable or in doubt.

Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir. 1986)(citing United States v. Sloan, 776 F.2d 926 (10th Cir. 1985)), rev'd on other grounds, 822 F.2d 1477, 1478 n.2 (10th Cir. 1987) (en banc), aff'd, 486 U.S. 356 (1988). General allegations supporting a request for court appointment of a psychiatric expert, without substantive supporting facts, and undeveloped assertions that psychiatric assistance would be beneficial to the defendant will not suffice to require the appointment of a psychiatrist to aid in the preparation of a criminal defense. Davis v.

Maynard, 869 F.2d 1401, 1407 (10th Cir. 1989), vacated on other grounds, 110 S. Ct. 1516 (1990); Cartwright, 802 F.2d at 1211.

In cases such as this, in which the trial court denied a criminal defendant court-appointed psychiatric assistance prior to the Supreme Court's determination in Ake, but to which Ake's standard applies, the question presented is whether, "upon review of the entire record, [petitioner] could have made a threshold showing under Ake that 'his sanity at the time of the offense is to be a significant factor at trial . . . .'" Cartwright, 802 F.2d at 1212 (emphasis in original). The record before this court supports the district

court's determination that petitioner could have made this showing.[3]

The State of Oklahoma charged petitioner with first degree murder on August 31, 1982. He was already in police custody at that time. On February 9, 1983, court-appointed defense counsel applied to the state trial court for a determination of petitioner's competency, asserting that petitioner's "mental state and communications abilities [were] such that they seriously interfere[d] with his understanding of the proceedings against him and with his capability of aiding . . . in preparation for trial."

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[3] We have supplemented the record on appeal with petitioner's Documentation of Ake Claim and his Evidentiary Submission, both filed with the district court. See 10th Cir. R. 10.2.4.

State Court Rec., vol. I, at 37. Defense counsel also requested that the trial court waive the notice requirement for the competency hearing, asserting that petitioner "is unable to communicate with his attorney to inform him of any relatives residing within or outside . . . Oklahoma." Documentation, Ake claim, exh. 2. The trial court consented to waive the notice requirement. Id.

The next day, after conducting a hearing on the application for a competency determination, the trial court ordered petitioner committed to the Oklahoma Department of Mental Health for sixty days for observation and examination, stating "there is a doubt as to the present competency of the said [defendant], by reason of personal

observation of the defendant by this Court; and testimony regarding defendant's ability to understand the proceedings against the defendant and the defendant's capability of aiding the attorney in preparation for trial." Id., exh. 1.

A month later, R. D. Garcia, M.D., the chief forensic psychiatrist at Eastern State Hospital where petitioner was confined, reported to the trial court that the hospital staff had determined that petitioner was capable of understanding the proceedings against him and of assisting his attorney with his defense and, that "[s]ince it is the consensus of our staff that [petitioner] is not in need of psychiatric treatment, we would therefore consider him as competent to stand trial at this time."

Id., exh. 3 at 1. The report also indicated that petitioner had not displayed any behavior that would indicate that he should be considered dangerous to himself or others, "at least not as a result of any overt psychotic symptoms elicited during his period of confinement in the hospital." Id. at 2.

The report further noted, however, that petitioner was being treated daily with 150 milligrams of Thorazine, a powerful antipsychotic medication, see Physician's Desk Reference 2116 (44th ed. 1990), as well as 400 milligrams of Tegretal [Tegretol], an anticonvulsant medication, see id. at 988, and four milligrams of Cogentin, a medication used to treat parkinsonism, a common side effect of Thorazine, see

id. at 1337. Documentation, Ake claim, exh. 3 at 2. The report to the court "of course recommend[ed] that this treatment be continued in order for [petitioner] to retain his present degree of stability." Id.

Relying upon the hospital's evaluation, the state trial court determined that petitioner was competent to stand trial. Evidentiary submission, exh. 3. Petitioner returned to the Oklahoma County jail, where, according to jail records, he was medicated with Haldol, yet another antipsychotic medication, see Physician's Desk Reference at 1282. Documentation, Ake claim, exh. 6.

Although Dr. Garcia noted in his report to the court that petitioner was well behaved while confined at the

hospital and did not present any management problems, documentation, Ake claim, exh. 3 at 2, Dr. Garcia's notes also reflect that petitioner had to be secluded for combative behavior on February 18 and March 3 and 4, 1983. Id., exh. 5 (state hospital records). In addition, on March 3, the staff also noted "definite sociopathic behavior" from petitioner. Id.

On February 25, 26, 27, 28, and 29, the staff had to medicate petitioner with 100-milligram doses of Thorazine in order to control his combative or agitated behavior. Id. Petitioner's behavior continued to require administration of 400 milligrams of Thorazine daily, from March 1 through March 7, when the dosage was reduced to

150 milligrams a day.[4] Id. Dr. Garcia

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[4] In his dissent to the affirmance of petitioner's conviction on direct criminal appeal, Judge Parks noted that petitioner's treatment with antipsychotic medication should have indicated to the trial court that there were serious concerns presented regarding petitioner's mental condition.

> [T]he psychiatric report indicated that during the period of the psychiatric examination, the [petitioner] was being maintained on 150 milligrams of Thorazine per day. Thorazine is an extremely powerful psychotropic drug. Its most common use is for the management of manifestations of psychotic disorders. See Physician's Desk Reference (39th Ed. Barnhart 1985), at 1977. In a special warning box, the Physician's Desk Reference states that Thorazine "is not the first drug to be used in therapy for most patients with non-psychotic anxiety because certain risks associated with its use are not shared by common alternative treatments . . . . When used in the treatment of non-psychotic anxiety [it] should not be

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administered in doses of not [sic] more than 100 mg. per day . . . ." Id. Therefore, assuming that the State's doctors were following standard medical practice, the fact that [petitioner] was being maintained on 150 milligrams of Thorazine per day strongly indicates that the doctors were concerned with "the management of manifestations of psychotic disorders." [Further], the psychiatric report recommended that the [petitioner] continue his Thorazine treatment "in order for him to retain his present degree of stability." The fact that Thorazine therapy was administered during the [petitioner's] psychiatric examination and the recommendation for continuation belie the psychiatric report's assertion that the [petitioner] was "not in need of psychiatric treatment," and indicate that the doctors entertained serious concern about his mental stability. . . . [T]he doctor's concern about [petitioner's] mental condition was further

recommended this medication continue after petitioner's release from the hospital. Id., exh. 3 at 2. On the day of his release, March 17, petitioner's agitated behavior required two milligrams of Ativan, an anti-anxiety medication, see Physician's Desk Reference at 2348. Documentation, Ake claim, exh. 5.

In addition to this treatment, the hospital staff implemented precautions in caring for petitioner, in light of his depression and threatened suicide. Id. Petitioner also received medication

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> illustrated by the fact that the psychiatric report suggested that [petitioner] be referred "to a mental health clinic in his locale for follow-up care on an out-patient basis as might be indicated."

Liles, 702 P.2d at 1039.

for insomnia and headaches throughout his stay at the hospital. Id.

Further notations in the hospital records indicate that, on March 1, petitioner experienced "strong inner feelings of wrath and anger" that he believed to be the product of his being possessed by a "violent alter ego" named Rock. Id. Several days later, petitioner became very angry, stating that he would "kill someone on the ward before the night [was] over," and claiming that he was no longer himself, but had become Rock and that Rock would take care of things. Id. At that time, petitioner claimed Rock had committed the murder. Id.

Dr. Garcia noted that petitioner "may be considered potentially dangerous, daring, with temper tantrums and a short

fuse, very easily ready to fight, as an aggressive and explosive individual, but not psychotic." Id. Dr. Garcia ultimately diagnosed petitioner as having a dysthmic personality disorder and an intermittent explosive disorder, along with a continuous alcohol dependence and episodic mixed substance abuse. Id. Notations in the records also indicated petitioner suffered from an "organic personality syndrome (intermittent explosive disorder)" and "mild focal brain damage secondary to cerebral trauma." Id.

Lance A. Portnoff, Ph.D., a clinical neuropsychologist and a consultant at Eastern Hospital, reported that, after examining and testing petitioner, his findings

> are suggestive of bilateral tempero-limbic dysfunction

secondary to brain trauma and polydrug abuse . . . . These findings are consistent with the reported episodes of dyscontrol, which can occur with such a locus of damage because of irritation or disinhibition of limbic structures mediating instinctual aggressive drives . . . . [T]he behavior described by the patient is consistent with an organic intermittent explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Such patients have diminished control over aggressive patterns of response, particularly if further disinhibiting influences such as drugs or alcohol are ingested. Because of the close proximity of limbic aggressive and memory structures, often the irritative effect which triggers tendencies for explosiveness also impairs memory encoding for the duration of the irritative ictus.

. . . .

[T]hese test findings are more consistent with a nonpsychotic [rather] than

> psychotic mental status, characteristic of adjustment disorder of mixed emotional features, organic personality syndrome (intermittent explosive disorder), alcohol abuse, continuous, mixed substance abuse, unspecified, and mild focal brain damage secondary to cerebral trauma.

Id.

In his subsequent affidavit, Dr. Portnoff further explained that

> the results of my evaluation [of petitioner in 1983] were consistent with the presence of an organic impairment, or physical dysfunction to [petitioner's] brain. The results suggested the presence of an organic intermittent explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Persons experiencing this problem may have a diminished ability to control aggressive impulses, and, as a result of damage to their brains, they may be capable of explosive, violent behavior during ictal, or seizure-like states. They

> may then have no memory or impaired memory of their violent behavior.

Id., exh. 8 at 1 (Affidavit of Lance A. Portnoff, Ph.D. (March 17, 1990)).

In corroboration of Dr. Portnoff's diagnosis, petitioner offered the affidavit of Russell R. Monroe, M.D., a professor of psychiatry at the University of Maryland School of Medicine. After examining petitioner's hospital records, Dr. Monroe

> concluded that there is a significant possibility that [petitioner] experiences an episodic behavioral disorder associated with a limbic ictus. Such a condition may lead an individual to commit acts of violence over which he lacks control in an ordinary sense, and which are not in an ordinary sense intentional. The possibility of a behavioral disorder associated with a limbic ictus is consistent with the findings in the February 25, 1983 neuropsychological

> evaluation conducted by L.A. Portnoff, Ph.D.
>
> . . . .
>
> In my opinion, further evaluation . . . is justified by the significant possibility that if [petitioner] indeed killed Mr. Yarbrough, he did so as a result of a brain disorder that produced a seizure-like event.

Id., exh. 9 at 1-2, 3 (Affidavit of Russell R. Monroe, M.D. (October 24, 1988)).

In addition to Dr. Portnoff's findings concerning possible mental conditions affecting petitioner, Dr. Portnoff reported, on February 25, 1983, that although petitioner had a factual and rational understanding of the charges against him, because of his depression, he was at that time incompetent to stand trial. Id., exh. 5. In his affidavit, Dr. Portnoff explained

that his competency determination was not included in the hospital's report to the trial court because he "was considered a consultant only, and was not a part of the forensic team assigned to [petitioner] at Eastern State Hospital." Id., exh. 8 at 1. Dr. Portnoff further asserted that

> [a]t that time it was the policy of Eastern State Hospital to report to the trial courts only the opinion on competency of their Chief Forensic Psychiatrist, Dr. R.D. Garcia. Any dissenting views from other staff members were not reported. At that time Dr. Garcia's view of competency to stand trial evaluations would have prevented him from considering either [petitioner's] depression or his apparent brain damage in determining competency. Dr. Garcia was of the belief that only psychotic individuals could be considered incompetent, and any individual who was non-

> psychotic was therefore competent.
>
> . . . .
>
> In the time I was employed at Eastern State Hospital by far most of the patients I saw there I considered to be competent. In my opinion [petitioner's] depression and incompetency [were] very real, and he was in no way malingering.

Id. at 1-2.

In an effort to suggest possible causes for petitioner's brain injuries, the affidavit of petitioner's mother asserted that he suffered physical and sexual abuse as a child, periods of head banging, head injuries from an automobile accident in which his head went through the windshield, repeated headaches, and episodes of sleepwalking. Evidentiary submission, exh. 29 (Affidavit of LaDonna Meadows (March 21, 1990)). A childhood acquaintance of

petitioner also attested to the fact that, when petitioner was fourteen years old, he fell approximately fifteen feet off a cliff, hit his head, and was unconscious for a time. Id., exh. 30 (Affidavit of Chuck Richmond (March 16, 1990)). The hospital records indicate petitioner said that he had suffered repeated minor head trauma from boxing. Documentation, Ake claim, exh. 5.

In her affidavits, petitioner's mother also stated that a psychiatrist treated petitioner for a time while he was in elementary school, Affidavit of LaDonna Meadows (June 3, 1987), and that, prior to his joining the Marines at age seventeen, petitioner had serious psychological problems, including exhibiting a split personality, Affidavit of LaDonna Meadows (June 4,

1987). "There were times when [petitioner] would only respond to you if you called him by the name of 'Rock.' There were times that he would disappear into the woods for days, and not remember much about it." Evidentiary submission, exh. 29 at 4. Petitioner's mother further attested that, while petitioner was in the Marines, she received notice from the Marine Corps that he had received psychiatric treatment. Id.

Petitioner's mother chronicled several episodes of explosive violence occurring throughout petitioner's life. He had, at various times, attempted to strike his mother, attempted to cut his brother with a broken bottle, and threatened to shoot his brother. Affidavit of LaDonna Meadows (June 3,

1987). He had also beaten his girlfriend, then disappeared for several days, finally emerging from the woods in a dazed state. Id. Petitioner's mother also witnessed occurrences suggesting to her that petitioner had killed his prized pet pit bulls. Id. When asked about the pets, petitioner insisted someone had killed them while he was away from home. Id.

Immediately preceding the murder, petitioner's pregnant wife had left him. Affidavit of LaDonna Meadows (June 4, 1987). Petitioner, according to his mother's affidavit, fell into a deep depression and again was found wandering dazed in the woods. Id. At the time of the murder, petitioner was in Oklahoma searching for his wife. Id.

In light of petitioner's history of mental problems, his treatment with antipsychotic medication, and the conflicting diagnoses of his incompetency and his mental condition in general, this record sufficiently supports the district court's determination that petitioner could have made a sufficient showing, under Ake, that his sanity was likely "to be a significant factor at trial." See Cartwright, 802 F.2d at 1212.

Respondent contends that petitioner cannot claim the state court's denial of a court-appointed psychiatrist deprived him of due process because he failed to assert an insanity defense at trial, unlike the defendant in Ake who presented an insanity defense even though the trial court had denied him

psychiatric assistance. See 470 U.S. at 72. In his motion seeking state funds in order to employ a psychiatrist or psychologist, defense counsel did assert that he had

> reason to believe that [petitioner] suffers from mental disease or defect, that would affect his capacity to appreciate the wrongfulness of his conduct or conform his [conduct to the] requirements [of the] law.
>
> . . . .
>
> The need for a psychologist [or] psychiatrist is clear . . . . Clearly, there is a need to determine whether [petitioner] had the ability to distinguish right from wrong at the time he allegedly committed these particular acts. A determination of this fact is relevant and material in determining guilt. It is further necessary for determining mitigating circumstances as authorized in 21 O.S. 1976 Supp. § 701.10.

Evidentiary submission, exh. 4 at 2.

In Ake, the Supreme Court held that, upon the requisite showing, a criminal defendant will be entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83 (emphasis added). One of the functions of such a court-appointed psychiatric expert, therefore, is to assist the defense in determining whether an insanity defense is viable or warranted under the circumstances of a particular case. Id. at 82; see also Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990); United States v. Fazzini, 871 F.2d 635, 637 (7th Cir.), cert. denied, 110 S. Ct. 517 (1989). "The right to psychiatric assistance .

. . means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate--including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment." Smith, 914 F.2d at 1157. Petitioner is therefore not precluded from asserting a due process challenge to the denial of his motion seeking a court-appointed psychiatrist simply because he did not proceed with an insanity defense after the denial of his motion for court-appointed psychiatric assistance. Indeed as the Court recognized in Ake, given the complex nature of mental disease, "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of

success.'" Ake, 470 U.S. at 81 (citation omitted).

Respondent next argues that petitioner cannot establish his entitlement to psychiatric assistance at the penalty phase of his trial because the state did not present any psychiatric evidence concerning the aggravating factor of petitioner's future dangerousness. In Ake, the Supreme Court determined that the state court had deprived the defendant of due process by denying him court-appointed psychiatric assistance in "presenting evidence to rebut the State's evidence of his future dangerousness." 470 U.S. at 83. The Court held that due process entitles a criminal defendant to psychiatric assistance "when the State presents psychiatric evidence of the

defendant's future dangerousness." Id. Although the Court discussed the necessity of psychiatric assistance to enable a defendant to respond to and challenge the state's psychiatric evidence concerning defendant's future dangerousness, the Court did not expressly limit a defendant's right of psychiatric assistance to situations where the state first presents psychiatric evidence. See id, at 83-84. Rather, the Court stated that "[t]he variable on which we must focus is . . . the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence." Id. at 84. In this case, because the state presented evidence concerning petitioner's future dangerousness, albeit not psychiatric

evidence, and because petitioner established the likelihood that his mental condition could have been a significant mitigating factor, the district court correctly determined that the state trial court deprived petitioner of due process by denying him court-appointed psychiatric assistance at the sentencing phase of his trial.

The judgment of the United States District Court for the Western District of Oklahoma granting petitioner habeas relief is AFFIRMED. The stay of the district court's order is dissolved. Respondents are to release petitioner from custody on the ninety-first day following the date of this opinion unless, within ninety days from the date of this opinion, the State of Oklahoma has elected to retry petitioner.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK ROY LILES, Petitioner, v. JAMES SAFFLE, Warden, Oklahoma State Penitentiary, GARY MAYNARD, Director, Oklahoma Department of Corrections, and ROBERT H. HENRY, Attorney General of Oklahoma, Respondents.	)))))CIV-89-2271-W))))))))))

JUDGMENT

Having determined that the petitioner's Motion for Summary Judgment should be granted and his conviction in Case No. CRF-82-4268 vacated, the Court hereby enters judgment in favor of the petitioner, Mark Roy Liles, and against

the respondents, James Saffle, Warden, Oklahoma State Penitentiary, and Gary Maynard, Director, Oklahoma Department of Corrections. As stated in this Court's Order, the respondents are to release the petitioner from custody on the 91st day following the date of this Order and Judgment, unless, within 90 days from the date of the Order and Judgment, the State of Oklahoma has elected to retry the petitioner.

Dated at Oklahoma City, Oklahoma, this 1 day of November, 1990

LEE R. WEST
UNITED STATES DISTRICT JUDGE

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK ROY LILES,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIV-89-2271-W
	)	
JAMES SAFFLE, Warden, Oklahoma State Penitentiary, GARY MAYNARD, Director, Oklahoma Department of Corrections, and ROBERT H. HENRY, Attorney General of Oklahoma,	)	
	)	
Respondents.	)	

O R D E R

On December 29, 1989, as amended, March 20, 1990, Mark Roy Liles filed a Petition for Writ of Habeas Corpus in this Court pursuant to title 28, section 2254 of the United States Code. Petitioner Liles was charged by

information[1] filed August 31, 1982, with one count of murder in the first degree in the death of Joe E. Yarbrough, in that the petitioner "willfully and unlawfully" killed Mr. Yarbrough by stabbing him with a knife during the commission of a robbery.

The petitioner was tried before The Honorable William S. Myers, Jr., District Judge, and convicted by a jury in the District Court of Oklahoma County, Oklahoma. State v. Liles, No. CRF-82-4268. The jury recommended a

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[1] Also named in the information as defendants were the petitioner's brother, Daniel Genel Liles, and Daniel's girlfriend, Gail Marie Conner. Daniel Liles was tried with the petitioner and received life imprisonment. Ms. Conner's trial was severed. She was permitted to plead guilty to a charge of manslaughter in the first degree. She was sentenced to twenty years in prison with ten of those years suspended.

sentence of death after finding two statutory aggravating circumstances.[2] The judgment and sentence of death imposed by the trial court[3] on July 11, 1983, pursuant to the jury's verdicts were thereafter appealed to the Oklahoma Court of Criminal Appeals.

The state court denied the appeal on June 20, 1985, and by a divided vote, affirmed the petitioner's conviction. Liles v. State, 702 F.2d 1025 (Okla.

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[2] The jury found that the killing was "especially heinous, atrocious, or cruel" and that the petitioner, if permitted to live, would commit "acts of violence that would constitute a continuing threat to society."

[3] In a report filed with the Oklahoma Court of Criminal Appeals, Judge Myers wrote that "[i]t was a close decision as to whether life imprisonment or death would be imposed" and that he "was a little surprised by the Death Sentence."

Crim. 1985). A Petition for Writ of Certiorari was lodged with the United States Supreme Court. This petition was denied on June 1, 1986. Liles v. Oklahoma, 476 U.S. 1164, reh'g denied. 478 U.S. 1028 (1986).

Petitioner Liles then filed an Application for Post-Conviction Relief, as amended, in the District Court of Oklahoma County, Oklahoma. The amended application was denied without a hearing by The Honorable James B. Blevins, District Judge, on April 28, 1987. An appeal from this decision was filed with the Oklahoma Court of Criminal Appeals. This appeal was denied on July 9, 1987. Liles v. State, No. PC-87-391. A second Petition for Writ of Certiorari was filed with the United States Supreme Court. This petition was also denied.

Liles v. Oklahoma, 484 U.S. 933 (1987), reh'g denied, 484 U.S. 1021 (1988).

The petitioner filed a second Application for Post-Conviction Relief and this application was likewise denied without a hearing on June 11, 1988, by The Honorable Leamon Freeman, District Judge. The Oklahoma Court of Criminal Appeals affirmed the denial of relief on April 25, 1989. On October 30, 1989, the United States Supreme Court denied the petitioner's third Petition for Writ of Habeas Corpus. Liles v. Oklahoma, 110 S. Ct. 353 (1989).

In this Court, the petitioner raised thirteen grounds of error in his Petition for Writ of Habeas Corpus, as amended. Respondents James Saffle, Warden, Oklahoma State Penitentiary, Gary Maynard, Director, Oklahoma

Department of Corrections, and Robert H. Henry, Attorney General of Oklahoma,[4] responded in opposition.

Petitioner Liles also filed a Motion for Summary Judgment seeking summary adjudication of the first of his thirteen grounds of error based upon on his contention that the issue raised therein was dispositive of this action. At the request of the petitioner, the Court heard oral argument on the Motion for Summary Judgment. At the conclusion

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[4] In the response, Attorney General Henry sought dismissal on the ground that he was not a proper respondent. Rule 2(a), Rules Governing Section 2254 Cases in the United States District Courts, provides that "the state officer having custody of the [petitioner] shall be named as respondent." Thus, Attorney General Henry is entitled to the requested dismissal. The Court notes that no such argument was made on behalf of respondent Maynard and thus, he remains a party to this litigation.

of the hearing, the Court advised the parties that resentencing of petitioner Liles was warranted. The Court took under advisement whether a new trial was likewise warranted. This Order memorializes the Court's determination with regard to resentencing and sets forth its determination with regard to retrial.[5]

In discussing the issue raised in the Motion for Summary Judgment, the Court finds it unnecessary to recite in detail the events giving rise to the petitioner's conviction and sentence of death except to state that Mr. Yarbrough

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[5] While the petitioner in his Motion for Summary Judgment sought immediate release and dismissal of the state action, the Court has considered only the alternative relief requested: retrial and sufficient funds to explore the issue of mental illness.

was stabbed seven times by the petitioner during a robbery. The robbery occurred in a motel room to which Mr. Yarbrough had been lured by Gail Marie Conner, the girlfriend of the petitioner's brother, Daniel Gene Liles. Mr. Yarbrough's body was put in a trunk where it was discovered three days later near the South Canadian River.

In his Motion for Summary Judgment, the petitioner has argued that he was deprived of his rights to due process of law and equal protection under the laws in violation of the fourteenth amendment to the United States Constitution under Ake v. Oklahoma, 470 U.S. 68 (1985).[6]

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[6] Because Ake was decided while the petitioner's case was on direct appeal to the Oklahoma Court of Criminal Appeals, there is no issue of retroactivity presented in this case. See Griffith v. Kentucky, 479 U.S. 314 (1987). There is likewise no dispute

In Ake, the United States Supreme Court held that the Constitution requires that a state provide access to the psychiatric assistance necessary to prepare an effective defense based on mental condition if a criminal defendant cannot otherwise afford such assistance.

Recognizing that a defendant's mental condition is not necessarily at issue in every criminal proceeding, the Supreme Court described the level of need for psychiatric assistance that was sufficient to trigger a state's obligation to provide funds.

The Supreme Court stated

> "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant

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regarding exhaustion of state court remedies.

> access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

Id. at 83. The Supreme Court also found that the assistance of a psychiatrist was warranted during capital sentencing proceedings when the "future dangerousness" of a defendant was a significant factor. Id.[7]

The United States Court of Appeals for the Tenth Circuit has stated that in order to satisfy Ake. a defendant's showing on this issue "must be clear and genuine, one that constitutes a 'close' question which may well be decided one

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[7] See, 470 U.S. at 92 (Rehnquist, J., dissenting)(majority's discussion regarding sentencing process should be treated as dicta). This view is not the law and this Court is obligated to apply the rule as stated in the majority opinion rather than a position expressed in the dissent.

way or the other. It must be one that is fairly debatable or in doubt." Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir. 1986), rev'd on other grounds. 822 F.2d 1477, 1478 n.2 (10th Cir. 1987)(en banc), aff'd, 486 U.S. 356 (1988). The Tenth Circuit has also stated that a court presented with a petition for writ of habeas corpus should engage in a "review of the entire record," 802 F.2d at 1212, to determine whether the petitioner "could have made a threshold showing under Ake that 'his sanity at the time of the offense is to be significant factor at trial . . . ." Id. In the instant case, the entire record includes pretrial and trial papers and proceedings, the petitioner's records from Eastern State Hospital in Vinita, Oklahoma, the petitioner's

medical records from the Oklahoma County Jail and affidavits from a family member and acquaintances which provide information regarding the petitioner's background and in particular, his life in Sandstone, West Virginia.

Pretrial and Trial Papers and Proceedings

On February 9, 1983, J. Thomas Elliott, court-appointed counsel for the petitioner, filed an Application for Determination of Competency wherein he stated (1) that the petitioner was currently incompetent to proceed, (2) that the petitioner was unable to comprehend his attorney or assist in his defense and (3) that the petitioner's mental state and communication abilities were such that they seriously interfered with his understanding of the proceedings against him and with his

ability to aid in preparation for trial. On the same day, The Honorable Homer Smith, District Judge, at the petitioner's request, waived the notice requirement for a determination of competency and set a hearing on February 10, 1983, to resolve the issue "[f]or the reason that it appear[ed] to the court that [the petitioner was] unable to communicate with his attorney to inform him of any relative residing within or outside the State of Oklahoma."

On February 10, 1983, Judge Smith issued an Order committing petitioner Liles to the custody of the Oklahoma Department of Mental Health for observation and examination. In his Order, Judge Smith wrote "that there is a doubt as to the present competency of

the [petitioner], by reason of personal observation . . . by this Court; and testimony regarding [the petitioner's] ability to understand the proceedings against [him] and the [petitioner's] capability of aiding the attorney in preparation for trial." Pursuant to this Order, petitioner Liles was taken on February 15, 1983, to Eastern State Hospital for evaluation.

Prompted by a letter dated March 9, 1983, from R.D. Garcia, M.D., chief forensic psychiatrist at Eastern State Hospital, indicating that the petitioner was competent, the prosecutor, assistant district attorney Virgil "Chuck" Black, on March 15, 1983, applied to the state court for a post-examination competency hearing. While a hearing was scheduled for March 21, 1983, no hearing in fact

occurred. Rather, the then-assigned judge, The Honorable Raymond Naifeh, based upon Dr. Garcia's letter alone, declared the petitioner competent and ordered the proceedings to resume.

In his letter, Dr. Garcia wrote that

> "[s]ince it is the consensus of our staff that Mark Roy Liles is not in need of psychiatric/treatment, we would therefore consider him as competent to stand trial at this time."

Dr. Garcia wrote further that

> "[t]here has been no behavior displayed on the part of Mark Roy Liles to indicate to the staff that he would be considered to be dangerous to himself and/or others in society, at least not as a result of any overt psychotic symptoms elicited during his period of confinement in this hospital."

Dr. Garcia however also added that the petitioner was

> "being maintained on . . . Thorazine 50 mgms. t.i.d.; Tegretol 200 mgms. b.i.d.; and Cogentin 2 mgms. b.i.d.

> (discontinue after two weeks). We would of course recommend that this treatment be continued in order for him to retain his present degree of stability. We might suggest that he would be referred to a mental health clinic in his locale for follow-up care on an outpatient basis as might be indicated."[8]

On May 3, 1983, counsel for the petitioner filed a motion wherein he sought funds to employ certain experts.[9] In the motion he stated that he required the assistance of experts "[i]n order to present an effective defense," and

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[8] Thorazine is indicated for the management of manifestations of psychotic disorders. Physician's Desk Reference (44th ed. 1990) at 2116. Tegretol is an anticonvulsant. Id. at 990. Cogentin is indicated for use as an adjunct in the therapy of all forms of parkinsonism and in the control of extrapyramidal disorders. Id. at 1337.

[9] Counsel sought funds to employ (1) a psychologist, psychiatrist and/or education testing specialist, (2) a parole and probation expert and (3) a sociologist and "expert on the death penalty."

"further . . . to present evidence in mitigation as constitutionally allowed and mandated by the United States Supreme Court . . . ."

In particular, counsel stated that he needed

> "to employ a psychologist or psychiatrist to perform intelligence or personality tests on the [petitioner]."

Counsel stated that he had

> "reason to believe that [the petitioner] suffers from mental disease or defect, that would affect his capacity to appreciate the wrongfulness of his conduct or conform his [conduct] to law."

Defense counsel added that he was not contending

> "that his client cannot aid nor assist him, in fact contends that his client can aid and assist him in presenting a rational defense, but [that he] is concerned that at the time of the alleged commission of these acts, the defendant may have been suffering from such mental disease as to prevent his ability from distinguishing right

from wrong."

Counsel stated further that

> "[t]he need for a psychologist [or] psychiatrist is clear. The facts of this case involve robbery and murder. Clearly, there is a need to determine whether the [petitioner] had the ability to distinguish right from wrong at the time he allegedly committed these particular acts. A determination of this fact is relevant and material in determining guilt. It is further necessary for determining mitigating circumstances . . . ."

No funds were provided to employ any of the requested expert witnesses and the matter proceeded to trial with Judge Myers presiding.

The Oklahoma Court of Criminal Appeals found no error in this denial of funds since the petitioner had not pled or attempted to prove a defense of insanity and since, in applying for the funds, the petitioner had failed to show cause for doubting his sanity. 702 P.2d

at 1034; see id. at 1037 (Brett, specially concurring)("[D]efendant failed to raise any question as to his sanity.").

The Honorable Edgar H. Parks, Presiding Judge, in his dissent found that the petitioner had made the necessary preliminary showing under Ake that his mental state at the time of the offense was likely to be a significant factor at both the guilt and the sentencing stages of his trial. Judge Parks wrote:

> "First, [the petitioner] made a request for a court appointed psychiatrist and other expert assistance. Such a request should put a trial court on notice that expert testimony might play a significant part at trial. Second, the trial court had previously complied with [the petitioner's] request and ordered a psychiatric examination on the question of his competency to trial. Third, the psychiatric report indicated that it was the

'consensus' of the staff doctors that the [petitioner] was not in need of psychiatric treatment and was competent to stand trial. Consensus is an ambiguous term. It may mean unanimity or it may mean majority. Webster's New Collegiate Dictionary (1979). Therefore, the trial court was aware that there might possibly be some disagreement among the doctors as to [the petitioner's] mental condition. Further, the psychiatric report indicated that during the period of the psychiatric examination, the [petitioner] was being maintained on 150 milligrams of Thorazine per day. Thorazine is an extremely powerful psychotropic drug. Its most common use is for the management of manifestations of psychotic disorders. See Physician's Desk Reference (39th ed. Barnhart 1985), at 1977. In a special warning box, the Physician's Desk Reference states that Thorazine 'is not the first drug to be used in therapy for most patients with non-psychotic anxiety because certain risks associated with its use are not shared by common alternative treatments . . . . When used in the treatment of non-psychotic anxiety [it] should not be administered in doses of not more than 100 mg. per day . . . .' Id. Therefore, assuming that the State's doctors were following

standard medical practice, the fact that [the petitioner] was being maintained on 150 milligrams of Thorazine per day strongly indicates that the doctors were concerned with 'the management of manifestations of psychotic disorders.' Fifth, the psychiatric report recommended that the [petitioner] continue his Thorazine treatment 'in order for him to retain his present degree of stability.' The fact that Thorazine therapy was administered during the [petitioner's] psychiatric examination and the recommendation for continuation belie the psychiatric report's assertion that the [petitioner] was 'not in need of psychiatric/treatment,' and indicate that the doctors entertained serious concern about his mental stability. Sixth, the doctor's concern about [the petitioner's] mental condition was further illustrated by the fact that the psychiatric report suggested that [the petitioner] be referred 'to a mental health clinic in his locale for follow-up care on an out-patient basis as might be indicated.' Seventh, the psychiatric report stated: 'There has been no behavior displayed on the part of [the petitioner] to indicate to the staff that he would be considered to be dangerous to himself and/or others in society, at least not as a

> result of any overt psychotic symptoms elicited during his period of confinement in this hospital.' Given the fact that the State was specifically alleging the aggravating factor of future dangerousness, this statement alone should be sufficient to alert a trial court to the fact that the [petitioner's] state of mind was likely to be a significant factor at the sentencing stage of the trial. Finally, contrary to the majority's assertion, the state raised the issue of the relevance of the [petitioner's] state of mind by charging him with the aggravating factor of future dangerousness and introducing police and other testimony in an attempt to meet its burden of proof."

Id. at 1039-40.

Eastern State Hospital Records

The records of the petitioner's hospitalization from February 15, 1983, to March 17, 1983, at Eastern State Hospital contain the following entries:

a. Lance A. Portnoff, Ph.D., a clinical neuropsychologist, examined the

petitioner and in a report dated February 25, 1983, wrote that his findings

> "are suggestive of bilateral temporo-limbic dysfunction secondary to brain trauma and polydrug abuse. These findings are consistent with the reported episodes of dyscontrol, which can occur with such a locus of damage because of irritation or disinhibition of limbic structures mediating instinctual aggressive drives. . . . [T]he behavior described by the patient is consistent with an organic intermittent explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Such patients have diminished control over aggressive patterns of response, particularly if further disinhibiting influences such as drugs or alcohol are ingested. Because of the close proximity of limbic aggressive and memory structures, often the irritative effect which triggers tendencies for explosiveness also impairs memory encoding for the duration of the irritative ictus. . . .
>
> "In terms of competency, the patient has a factual and rational understanding of the charge against him. However, because of

> his depression, he cannot consult with a lawyer in the rational preparation of his defense. He claims that he wants to die and does not wish to prolong the agony by defending himself in court. This suggests that the patient has a self-defeating attitude and would not be expected to defend himself capably."

Dr. Portnoff noted further that

> "[t]aken together with the available historical and behavioral data, these test findings are more consistent with a non-psychotic than a psychotic mental status, characteristic of . . . [a]djustment disorder with mixed emotional features[,] [o]rganic personality syndrome (intermittent explosive disorder)[,] [a]lcohol abuse, continuous[,] [m]ixed substance abuse, unspecified[, and] [m]ild focal brain damage secondary to cerebral trauma . . . ."

He concluded his report by stating that "[b]ecause of his depression, the patient is currently not competent to stand trial."

b. A treatment team progress note on March 1, 1983, indicated that the

petitioner was experiencing "strong inner feelings of wrath and anger" that he (the petitioner) believed to be the product of possession by a "violent alter ego" named "Rock."

c. A treatment team progress note made three days later by Dorothy Sherwood, R.N., indicated that the petitioner was very angry and stated that he would "kill someone on the ward before the night [was] over." The petitioner claimed to be no longer himself, having become "Rock" and that "'Rock' would take care of things." The petitioner further claimed that "Rock" had committed the murder giving rise to his conviction.

d. The petitioner was released on March 17, 1983, and a discharge summary prepared by Dr. Garcia stated the final

forensic diagnosis was inter alia dysthymic personality disorder and intermittent explosive disorder. Dr. Garcia also wrote that the petitioner "was behaving well and there was no problem in his management." He noted however

(1) that the petitioner had to be secluded for "combative behavior" on February 18 and March 3, 1983;[10]

(2) that on March 3, 1983, a "definite sociopathic behavior" was indicated;

(3) that the petitioner was given Thorazine 100 mg. orally on February 25, 1983, and again on February 26, 27 (Concentrate), 28 (75 mg. IM STAT) and

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[10] A treatment team progress note indicates that the petitioner was also secluded on March 4, 1983.

29, 1983, for his combative or agitated behavior;

(4) that the petitioner was given Thorazine Concentrate 100 mg. four times a day for this behavior and this medication continued in that amount to March 7, 1983, when it was reduced to 50 mg. three times a day;

(5) that due to depression and threatened suicide, minimal precautions were taken; and

(6) that on the very day of his release, the petitioner was given Ativan 2 mg. STAT for agitation.

Dr. Garcia also wrote that the petitioner

> "may be considered potentially dangerous, daring, with temper tantrums and a short fuse, very easily ready to fight, as an aggressive and explosive individual, but not psychotic."

Dr. Garcia concluded his report by

recommending that the petitioner

> "continue to take Tegretol 200 mg. three times a day in order to curb behavior only and no neurotropic or psychotropic medication necessary. Refer to outpatient clinic for periodic checkup. He is definitely competent in a psychiatric, sociological and legal point of view at this time."[11]

The petitioner has also submitted the affidavit of Dr. Portnoff wherein he states:

> "4. The results of my evaluation [of the petitioner in 1983] were consistent with the presence of an organic impairment, or physical dysfunction to Mr. Liles' brain. The results suggested the presence of an organic intermittent

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[11] As stated, Dr. Garcia in his letter dated March 9, 1983, wrote however that the petitioner was 'being maintained . Thorazine 50 mgms. t.i.d.; Tegretol 200 mgms. b.i.d.; and Cogentin 2 mgms. b.i.d. (discontinue after two weeks)" and further that "[w]e would of course recommend that this treatment be continued in order for him to retain his present degree of stability."

explosive disorder secondary to traumatic contusion of mesial hemisphere structures. Persons experiencing this problem may have a diminished ability to control aggressive impulses, and, as a result of damage to their brains, they may be capable of explosive, violent behavior during ictal, or seizure-like states. They may then have no memory or impaired memory of their violent behavior.

"5. I further concluded that Mr. Liles was not competent to stand trial. I found that he was experiencing depression to the extent that he could not consult with a lawyer in the rational preparation of his defense. Despite my opinion of Mr. Liles' incompetency to stand trial, I was considered a consultant only, and was not a part of the forensic team assigned to Mr. Liles at Eastern State Hospital. At that time it was the policy of Eastern State Hospital to report to the trial courts only the opinion on competency of the then Chief Forensic Psychiatrist, Dr. R.D. Garcia. Any dissenting

views from other staff members were not reported. At that time Dr. Garcia's view of competency to stand trial evaluations would have prevented him from considering either Mr. Liles' depression or his apparent brain damage in determining competency. Dr. Garcia was of the belief that only psychotic individuals could be considered incompetent, and any individual who was non-psychotic was therefore competent.

. . . .

"7. In order to adequately determine the extent of Mr. Liles' organic impairment I would have wanted to obtain as much historical information as possible concerning Mr. Liles' head injuries, hyperactivity, trance-like states, seizures, and headaches. I also think that further testing should have been done. This testing should have included a sleep deprived EEG, a CT-SCAN, and a complete neurological workup. However, while I was employed at Eastern State Hospital it was almost impossible to have such

> additional testing approved, especially for patients admitted for competency determinations, because of security precautions and budgetary constraints.

. . . .

> "9. In the time I was employed at Eastern State Hospital by far most of the patients I saw there I considered to be competent. In my opinion Mr. Liles' depression and incompetency [were] very real, and he was in no way malingering."

Affidavit of Lance A. Portnoff, Ph.D. (March 17, 1990).

Russell R. Monroe, a medical doctor and a Professor of Psychiatry at the University of Maryland School of Medicine, Baltimore, Maryland, who specializes in the study of certain forms of brain disease and human behavior, also has submitted an affidavit to the Court at the request of the petitioner's counsel. Dr. Monroe

states in his affidavit that after having reviewed the petitioner's records from Eastern State Hospital, that he has

> "concluded that there is a significant possibility that Mr. Liles experiences an episodic behavioral disorder associated with a limbic ictus. Such a condition may lead an individual to commit acts of violence over which he lacks control in an ordinary sense, and which are not in an ordinary sense intentional. The possibility of a behavioral disorder associated with a limbic ictus is consistent with the findings in the February 25, 1983 neuropsychological evaluation conducted by L.A. Portnoff, Ph.D."

Dr. Monroe states further that

> "[a]dditional study and evaluation are indicated to determine whether Mr. Liles experiences an episodic behavior disorder associated with a limbic ictus, and whether such a condition contributed to the killing of Joe Yarbrough . . . . Further evaluation of Mr. Liles could include these steps: (1) Obtaining a sleep deprived electroencephalogram (EEG). . . . (2) Observing the effects of anti-convulsant medication. If Mr. Liles' propensity to violent outbursts is controlled by

anticonvulsant medication, this would be strong circumstantial evidence that his behavior has its roots in an organic brain disorder. (3) The development of a more detailed history, or phenomenology, of Mr. Liles' explosive behavior.

"In addition, study of the circumstances of Mr. Yarbrough's killing, and of Mr. Liles' behavior surrounding the time of Mr. Yarbrough's killing, would be necessary before forming an opinion of the relationship between a disorder similar to the sort that I have been discussing and the killing of Mr. Yarbrough.

"In my opinion, further evaluation along the lines that I have outlined here is necessary, and is justified by the significant possibility that if Mr. Liles indeed killed Mr. Yarbrough, he did so as a result of a brain disorder that produced a seizure-like event."

Affidavit of Russell R. Monroe, M.D. (October 24, 1988).

Oklahoma County Jail Medical Records

The medical records from the Oklahoma County Jail where the petitioner was

incarcerated after his release from Eastern State Hospital and prior to trial reflect treatment with the medication prescribed by Dr. Garcia. They also indicate that the petitioner was treated with Haldol[12] during his incarceration.

Affidavits

The petitioner has presented affidavits from LaDonna Meadows, the petitioner's mother, and from acquaintances who knew the petitioner when he lived in Sandstone, West Virginia. The petitioner moved to Sandstone in 1976 when he was fourteen years old. His mother had married for the fifth time and she and her husband,

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[12] Haldol is indicated for use in the management of manifestations of psychotic disorders. Physician's Desk Reference (44th ed. 1990), at 1282.

Jim Meadows, moved to Sandstone with her four children - Daniel Gene, Mark Roy, Mike and Casey. The affidavits were offered to describe the petitioner's behavior and his development as well as to offer reasons why behavioral changes may have occurred.

Mrs. Meadows in her affidavit recounted events in the petitioner's life including abuse, both physical and sexual, periods of head banging, an automobile accident when the petitioner was three or four years old in which the petitioner's head went through the vehicle's windshield, repeated headaches and episodes of sleep walking. Affidavit of LaDonna Meadows (March 21, 1990). She also stated that

> "[t]here were times when Mark would only respond to you if you called him by the name 'Rock.' There were times that he would

> disappear into the woods for days, and not remember much about it."

Id. at 4.

One individual, Chuck Richmond, stated in his affidavit that when the petitioner was fourteen years old, while climbing a cliff, he (the petitioner) slipped and fell approximately fifteen feet. This affiant stated that the petitioner "must have hit his head because he was knocked out cold" and that "he was addled for quite awhile afterwards." Affidavit of Chuck Richmond (March 16, 1990).

Findings and Conclusions

Summary Judgment is appropriate in this case as in any civil action only if the Court is satisfied that no genuine issue of material facts exists and that the moving party is entitled to judgment as a matter of law. Rule 56(c),

F.R.Civ.P. The Court must view the evidence[13] presented in the light most favorable to the respondents as the parties opposing summary judgment and then decide whether such evidence "presents a sufficient disagreement to require submission to the [ultimate factfinder] or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The Court is mindful that in cases where there is a conflict in the

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[13] The respondents did not agree that certain material facts were not in dispute. But in challenging these facts, the respondents merely rested on denials in their pleadings or stated "that they [were] without sufficient knowledge or information to form a belief as to the truth of the facts asserted . . . ." Rule 14(B), Rules of the United States District Court for the Western District of Oklahoma, and extant case law require more to establish that facts are in dispute.

evidence or whether different inferences are permissible under uncontroverted facts, summary judgment is not proper and the issues should be reserved for resolution at a later stage. In this case, the Court finds that no genuine issue as to any material fact exists which renders summary adjudication inappropriate on the issue raised in the Motion for Summary Judgment and further, that the petitioner is entitled as a matter of law not only to resentencing but also to a new trial.

The petitioner is not required at this stage to prove that he was in fact mentally ill at the time the crime was committed or that experts hold such opinion and the Court, by granting the requested relief, is not expressing any opinion as to the petitioner's mental

state on or about August 27, 1982. Rather, the Court opines only that the entire record demonstrates that the petitioner could have made the threshold showing under Ake that his mental state at the time of the offense was likely to be a significant factor at trial. The issue of mental illness is clear and genuine; it "constitutes a 'close' question that may well be decided one way or the other." 802 F.2d at 1211.

Indeed, the Supreme Court did not attempt in Ake to establish a procedure whereby independent psychiatric examination could determine the validity of a criminal defendant's defense of insanity. Rather, the opinion in Ake is directed to providing a criminal defendant with "the 'basic tools of an adequate defense,'" 470 U.S. at 77

(quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)), and reaffirms "that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" Id. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)). Ake recognizes that

> "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the

> probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. 'Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the 'elusive and often deceptive' symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense."

470 U.S. at 80-81.

Ake does not guarantee a psychiatrist who will reach only favorable conclusions. It guarantees only that once a defendant has demonstrated that

his mental condition at the time of the offense is to be a significant factor at trial, he be permitted the opportunity to determine if a defense based on mental condition is viable and if so, the further opportunity to present that defense effectively. And in capital cases, Ake allows defense counsel the opportunity to attempt to portray a defendant's crime as understandable in light of the unique circumstances affecting that defendant's development and behavior and to rebut evidence of circumstances in the defendant's background that the state has introduced to prove the existence of aggravating circumstances. The denial of the instant petitioner's Motion for Funds for Expert Witness foreclosed these opportunities.

The record demonstrates that the petitioner's request for funds was not based on general allegations of need. The seven factors articulated by Judge Parks in his dissenting opinion demonstrate that further inquiry and investigation by one trained in psychiatric matters was demanded. These factors coupled with the remaining evidentiary submissions and particularly the records from Eastern State Hospital clearly evince the need for the assistance of a psychiatric expert.

The respondents' primary arguments in opposition to the petitioner's entitlement to the assistance of a psychiatrist are (1) the petitioner never raised the defense of insanity at trial and (2) the state did not present a psychiatrist during the penalty phase

of the petitioner's trial. The Court finds these arguments are without merit.

As the Supreme Court stated in Ake. when jurors are considering the issues of mental illness and the likelihood of future dangerousness,

> "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them."

470 U.S. at 82 (footnote omitted). There is no requirement that the petitioner put forth a defense based upon mental condition without the services of a psychiatrist and fail to preserve his right to psychiatric

assistance in the first instance. Without the assistance of a psychiatrist, a defendant is handicapped in presenting evidence that would create sufficient doubt as to competency.[14]

The Court finds further that once the prosecutor has made the defendant's mental state relevant to his culpability[15] and particularly to the

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[14] "'[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.'" Ford v. Wainwright, 477 U.S. 399, 414 (1986)(quoting Solesbee v. Balkcom, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)).

[15] Mental state was relevant to the petitioner's culpability. At the petitioner's request, the trial court instructed the jury on murder in the second degree. Only with the assistance of a psychiatrist can counsel make an informed decision either to show that an act was the product of mental illness or to not assert any defense of mental impairment.

punishment[16] the defendant might suffer

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[16] Despite the respondents' argument that the mental state of the petitioner was not an issue at trial, the prosecutor himself during his closing argument in the penalty phase stated:

"Something's happening--something happened to Mark Liles, something between the time he left West Virginia, Sandstone, West Virginia, for the Marine Corps and August of 1982 when he was in Oklahoma City. Something changed him.

"He's not the kid who did the things that his mother said he did--and I assume they were true. . . .

"Something happened to Mark Liles that changed him from the kid described by his parents to the man in Room 1208 at the Alamo Plaza; the man after that, the man who has yet to show the slightest sign of remorse, not a bit, nothing, certainly not to Joe Yarbrough at the time, who rapidly stabbed him in the chest. . . . [J]ust do it and take him and get his thirty dollars and it's over. That's all. Something is different about him."

Transcript of Stage II Proceedings (May 12, 1983), at 70, lines 321.

as in the instant case, the defendant's right to psychiatric examination and assistance is not dependent upon the prosecutor's tactical decisions regarding the use of psychiatric testimony. As Judge Parks stated in his dissent,

> "[t]he use of psychiatric testimony by the State to establish future dangerousness makes a defendant's need for expert assistance in the Supreme Court's formulation, compelling. However, such testimony should not be the triggering factor. A rule making the [petitioner's] right to assistance on this key issue depend on the prosecutor's discretion would be untenable."

702 P.2d at 1040 (emphasis deleted).[17] To hold otherwise in those instances where

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[17] Contra, Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990)(Ake does not recognize general right to psychiatrist in presentation of mitigation factors where state does not present psychiatric testimony to establish aggravating factors).

the mental state of the defendant is a significant factor in the penalty phase could restrict presentation of relevant mitigating evidence that is the hallmark of a constitutional capital sentencing scheme.

Accordingly, the Court finds that the petitioner's Motion for Summary Judgment is GRANTED and that his conviction in Case No. CRF-82-4268 is VACATED. The respondents are DIRECTED to release the petitioner from custody on the 91st day following the date of this Order and the Judgment entered pursuant hereto, unless, within 90 days from the date of this Order and Judgment, the State of Oklahoma has elected to retry the petitioner.

ENTERED this _____ day of November, 1990

_____
LEE R. WEST
UNITED STATES DISTRICT JUDGE